Rule 5, Ariz. R. Crim. Proc.

PRELIMINARY HEARINGS, in general……Revised 12/2009

The purposes and scope of preliminary hearings in Arizona are set forth in Rule 5.3, Ariz. R. Crim. P. That Rule states:

> Rule 5.3. Nature of the preliminary hearing
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> a. Procedure.
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> The preliminary hearing shall be held before a magistrate who shall admit only such evidence as is material to the question whether probable cause exists to hold the defendant for trial. All parties shall have the right to cross-examine the witnesses testifying personally against them, and to review their previous written statements prior to such cross-examination. At the close of the prosecution's case, including cross-examination of prosecution witnesses by the defendant, the magistrate shall determine and state for the record whether the prosecution's case establishes probable cause. The defendant then may make a specific offer of proof, including the names of witnesses who would testify or produce the evidence offered. The magistrate shall allow the defendant to present the offered evidence, unless the magistrate determines that it would be insufficient to rebut the finding of probable cause.
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> b. Inapplicability of Suppression Motions.
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> Rules or objections calling for the exclusion of evidence on the ground that it was obtained unlawfully shall be inapplicable in preliminary hearings.

A preliminary hearing is a check on government power designed to prevent possible abuses of authority which might arise if defendants could be charged with crimes without any requirement that a magistrate be satisfied that the charges are supported by evidence. *In Re Anonymous, Juvenile Court No. 6358-4*, 14 Ariz. App. 466, 471, 484 P.2d 235, 240 (1971).

Rule 5.4(c), Ariz. R. Crim. Proc., states that the probable cause finding "shall be based on substantial evidence, which may be hearsay in whole or in part. The "substantial evidence" standard needed to hold a defendant to answer is far lower than the proof beyond a reasonable doubt required to find a defendant guilty of a crime. "Evidence required to establish guilt is not necessary. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing the offense has been committed." *State v. Buccini,* 167 Ariz. 550, 559, 810 P.2d 178, 187 (1991), *quoting Henry v. United States*, 361 U.S. 98, 102 (1959) [citations omitted]. Probable cause exists **"**when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Jackson*, 208 Ariz. 56, 65, ¶ 31, 90 P.3d 793, 802 (App. 2004), *quoting State v. Hoskins*, 199 Ariz. 127, 137-138, ¶ 30, 14 P.3d 997, 1007-008 (2000).

> It is not … necessary that the evidence at a preliminary hearing establish the guilt of the accused beyond a reasonable doubt. Reasonable or probable cause exists if the proof is sufficient to cause a person of ordinary caution or prudence conscientiously to entertain a reasonable suspicion that a public offense had been committed in which the accused participated.

State v. Forgan, 19 Ariz.App. 124, 126, 505 P.2d 562, 564 (1973), *quoting Drury v. Burr*, 107 Ariz. 124, 125, 483 P.2d 539, 540 (1971).

Probable cause is a flexible standard, in which the totality of the circumstances dictate whether or not a defendant is to be bound over. As the Arizona Court of Appeals

said in the context of probable cause to arrest, "Probable cause is a flexible, nontechnical, and practical concept." *State v. Keener*, 206 Ariz. 29, 33, ¶ 16, 75 P.3d 119, 123 (App. 2003). The determination of whether or not a given set of facts constitutes probable cause does not derive from a formulaic evaluation by the magistrate but rather must be determined by the facts and circumstances of each case. *Cullison v. City of Peoria*, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). "Whether a given state of facts constitutes probable cause is always a question of law to be determined by the court." *Id.* In *Drury v. Burr*, 107 Ariz. 124, 125, 483 P.2d 539, 540 (1971), the Arizona Supreme Court stated, "Where there is more than one inference equally reasonable then probable cause does not exist, but where one inference is more reasonable than another and is on the side of guilt, then probable cause may be said to exist." Likewise, in *Hafenstein v. Burr*, 92 Ariz. 321, 322, 376 P.2d 782, 783 (1962), citing Dodd v. Boies, 88 Ariz. 401, 403-404, 357 P.2d 144, 146 (1960), the Court declared that a magistrate should not find probable cause unless there is more evidence that the defendant committed the offense than that he did not.